No. 83-411

IN THE

Supreme Court of the United States

October Term, 1983

GULF OIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
PHILADELPHIA GAS WORKS,
WASHINGTON URBAN LEAGUE,

Respondents.

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

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The respondent, Public Service Commission of the State of New York (New York),[1] opposes the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by the petitioner, Gulf Oil Corporation (Gulf).

[1]New York was a petitioner below seeking reversal of the Federal Energy Regulatory Commission's (FERC or Commission) order on *force majeure*. On the other matters below, New York was in intervenor supporting the Commission. Pet. App. 9A.

STATEMENT OF FACTS

For the second time, this Court is petitioned to review a Third Circuit opinion construing Gulf Oil Corporation's obligations under a warranty contract for the sale of natural gas. In *Gulf Oil Corporation* v. *FPC*, 563 F.2d 588 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), the Third Circuit upheld a ruling that found Gulf had violated the daily warranty obligations of its contract and ordered refunds to place all parties in the same economic position they would have occupied had Gulf performed its obligations.[2] That decision did not resolve, however, all questions of the extent and scope of Gulf's obligations.

The instant proceedings were instituted by the Federal Energy Regulatory Commission to resolve two issues: (1) the nature and extent of Gulf's interest obligation on refunds deferred pending the prior litigation; and (2) the extent to which Gulf's past non-performance might be excused by the *force majeure* provisions of its warranty contract. This latter issue has been circumscribed by the Third Circuit's earlier ruling, 563 F.2d at 601-03, that rejected a claim under the *force majeur* provisions for excuse due to the failure of the federal government to conduct offshore lease sales.

The two issues in the instant proceedings were resolved by separate orders of the Commission following separate procedural paths. The questions of Gulf's interest obligations with respect to deferred refund payments was the subject of a proposed Commission order (Pet. App. 55a), comments by the interested parties, and a final Commission order which, in addition to directing Gulf to

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[2]Under the plan approved by the Third Circuit, Gulf could recoup the refunds made over a period of time to the extent that its daily deliveries exceeded the warranty level. This plan known as the "refund-recoupment plan" allows Gulf to obtain the full price it had bargained for under the total contract, so long as it lived up to its obligations.

pay interest at the rates prescribed by the Commission's rules, denied Gulf's contention that it was not obligated to make any refunds (Pet. App. 65a; see pet. App. 91a, Order denying rehearing).[3]

The Commission instituted a separate proceeding to determine "whether any *force majeure* is appropriate in a warranty sale, and if so, whether the *force majeure* volumes asserted in Gulf's filing are accurate and reasonable and should be allowed" (Pet. App. 61a). At the hearing, Gulf presented evidence which showed a total deficiency in deliveries of approximately 307.2 Bcf (billion cubic feet) for the period August 1971 through December 1978 of which it claimed the occurrence of one or more of the twenty-seven specified *force majeure* events entitled it to reduce the deficiency refunds by 84.4 Bcf, or about 27.5% of the deficiency. Of the 84.4 Bcf claimed *force majeure* reduction, 71.3% of the total fell under the single *force majeure* category of "the necessity for making repairs to or alterations of machinery or lines of pipe," with these claims occuring on a continuous, almost daily basis (Pet. App. 14a). No evidence was introduced by Gulf concerning its efforts to overcome such events by using gas from other sources or concerning its efforts, if any, otherwise to avoid the non performance caused by these routine repairs.

At the close of Gulf's direct testimony, a motion was made to strike the testimony as insufficient as a matter of law to meet Gulf's *force amjeure* burden *(Ibid.)*. After full briefing, the Judge denied the motion to strike but, treating it as a motion for summary judgment, held that Gulf did not "establish a causal connection between the failure to deliver

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[3]The Court of Appeals' summary rejection of Gulf's challenge to the necessity to make any refunds is not the subject of Gulf's petition here.

the [daily] volumes of gas that Texas Eastern [the purchaser] demanded and alleged *force majeure* events." *Id.* Gulf's presentation, the Judge pointed out, was limited to a "mechanical exercise in pigeonholing volumes of gas" which never addressed how Gulf had attempted to avoid or overcome these events in meeting its obligations. Pet. App. 15a. The Judge also rejected Gulf's contention that its warranty only required it to have 625 MMcf per day available from which its daily delivery obligations would be met to the extent *force majeure* events did not intervene, finding that Gulf was required to have a sufficient "cushion" of gas available to enable it to deliver 625 MMcf when demanded. *Ibid.*

The Commission in Opinion No. 136 (Pet. App. 31a *et seq.*) reversed the Initial Decision based on its view that the issue before it was "not whether the *force majeure* provisions of the warranty contract excuses Gulf's performance ... [but] ... whether Gulf should be required to refund, subject to a recoupment mechanism, money attributable to gas Gulf would have delivered to Texas Eastern except for *force majeure*." Pet. App. 40a. In this context of the refund-recoupment plan, the Commission treated *force majeure* events as impermissible where they permanently excused, but absolved Gulf of all refund liability for temporary, non-performance of the daily delivery warranty "to the extent *force majeure* events caused underdeliveries but not excusing failure of supplies." Pet. App. 47a.

The Commission's opinion interpreted Gulf's contract to include an "unconditional warranty" going only to the total delivery obligation of 4.4 Tcf (trillon cubic feet) over the life

of the contract; this interpretation found also that the daily delivery obligation consisted solely of having 625 MMcf (million cubic feet) available for daily delivery. Pet. App. 46a. In reaching these conclusions, the Commission relied wholly upon the refund-recoupment plan, and ignored the contract itself. No mention is made of Gulf's daily delivery obligation under Article I, Paragraph 4 of the contract to provide "a quantity of gas sufficient to enable Seller [Gulf] to have available for delivery hereunder on any day or days not less" than 625 MMcf of gas. Pet. App. 21a. The "sufficient to enable" language, which suggests that an amount greater than 625 MMcf had to be available because Gulf could not continuously operate at optimum capacity, was not mentioned by the Commission.

Neither did the Commission look to the *force majeure* article itself (Pet. App. 11a n.8) which conditioned excuse of nonperformance on events "not within the control of the party claiming suspension." With over 70% of the claims falling under frequent and predictable routine "repairs to or alterations of" machinery or pipes, some review of whether these events were outside Gulf's control should have been undertaken. Instead, the Commission accepted *all* claims of *force majeure* that delayed performance under its view of the refund-recoupment plan. The Commission did address the separate "due diligence" requirement of the *force majeure*. Its findings that Gulf had exercised due diligence were based upon general operation and maintenance procedures and overall record of preventative maintenance, without discussion of efforts to overcome the specific claimed *force majeure* events which were found as meeting the requirements of the contract. Pet. App. 49a.

The Third Circuit reversed the Commission, ruling that the Commission's definition and its application were "in legal error" and that its findings were not supported by substantial evidence. Pet. App. 18a. The Court reviewed the contract itself for the requirements that Gulf must meet before *force majeure* events excuse non-performance. It found that Gulf was required to meet daily delivery warranties as well as total contractual warranties. Pet. App. 20a. The Court found that the daily warranty was separate and apart from the total contractual obligation. It required Gulf to have "a quantity of gas sufficient to enable seller to have available for delivery" its daily delivery obligation. *Ibid.* at 21a. It found also that the *force majeure* provisions required the claimed events to be beyond the control and without the fault or negligence of the claiming party. *Id.* at 18a and 11a n.8.

The Court looked primarily to the *force majeure* claims falling under "repairs or alterations" which comprised over 70% of the *force majeure* volumes. The Court found that these claims did not carry the "presumption of uncertainty" because of "their frequent, almost predictable occurrence [which] takes them outside of a *force majeure* excuse to nonperformance." *Id.* at 22a. The Court found that under the daily warranty, Gulf "must show that the availability of the gas, as well as its delivery of it, was affected by the occurrence of a *force majeure* event." *Id.*

On the due diligence issue, the Court found that Gulf's evidence of general operations and maintenance procedures to be inadequate. The due diligence standard requires Gulf to show "that it tried to overcome the results of the event's occurrences by doing everything within its control to

prevent or to minimize the event's occurrence and its effects." Pet. App. 23a. This standard came directly from the contract and from precedent, both of which mandate that "some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party." *Id.* at 24a. Gulf's showing had failed to show such correlation and thus the Court found no substantial evidence to justify the Commission's finding that the due diligence standard had been met.

REASONS FOR DENYING THE PETITION

The basic reason the case does not present issues warranting review by this Court has not changed since Gulf's similar petition for review of an earlier Third Circuit decision[4] holding that Gulf had breached the same warranty contract: Gulf's warranty contract, which is the subject of both court of appeals opinions, remains an extremely rare, if not unique, contract for the sale of natural gas. Thus, the court of appeals' rulings interpreting the contract and Gulf's obligations under the Commission's orders have little, if any, effect beyond the present circumstances. Because this Court does not sit to correct errors of law or fact of purely parochial interest which arguably have been committed by the court of appeals, the petition must be denied.

Even on their own terms, the legal grounds conjured up by Gulf do not justify granting its petition. The Third Circuit found that Gulf's first two arguments regarding the amount of interest to be applied to the refunds ordered by the Commission (Gulf Pet. 9-14), had "no merit" and, accordingly, affirmed the Commission without discussion. Pet. App. 9a and 26a. Contrary to Gulf's contentions, neither the Commission nor the court of appeals held that

[4] *Gulf Oil Corp.* v. *FERC*, 563 F.2d 588 (3rd Cir. 1977) *Cert. denied*, 434 U.S. 1062 (1978).

the instant order concerning the proper interest on refunds had modified the original orders establishing the refund-recoupment plan. The Court's conclusion that the instant orders on interst and refunds were consistent with the earlier order is limited to the facts of a unique remedial plan which obviously does not warrant plenary review by this Court.

I. The Court Of Appeals Made A Specific Interpretation Of The Contract Before It

Gulf's arguments concerning the court of appeals ruling on the *force majeure* provisions of the contract similarly do not present issues of general significance meriting further review: the court's rulings on *force majeure* are narrowly directed to the specific language of Gulf's warranty contract. The Third Circuit did not conclude in the abstract that *force majeure* events must be unforeseeable events. Instead, it held, in the context of a warranty contract requiring Gulf to provide "a quantity of gas sufficient to enable seller to have available for delivery ... not less than" 625 MMcf of gas per day (Pet. App. 21a), and a *force majeure* clause which excused delivery upon the occurrence of specified events which were neither within Gulf's control or could be overcome by the exercise of due diligence (Pet. App. 11a n.8), that Gulf's bare showing of the occurrence of *force majeure* events did not constitute an excuse for its massive under-deliveries.

In so holding, the court was not faced with an interpretation by the Commission of the *force majeure* provisions of the warranty contract. The Commission did not look at this case as a contractual matter, but rather as a policy interpretation of the proper refunds due under the

earlier refund-recoupment plan.[5] The Commission held that, as a matter of policy, it would not enforce the refund-recoupment plan it had previously established where daily under-deliveries were attributable to a claimed *force majeure* event. This holding rests upon an invalid assumption that the only warranty protected by the refund-recoupment plan obligates Gulf to warrant a total amount of gas over the life of the contract without regard for the daily delivery warranty. Gulf's arguments that the court of appeals' rejection of its *force majeure* claims present issues warranting review by this court and reinstatement of the Commission's opinion dissolve into abstractions culled from isolated sentences in the opinion below.

The court of appeals did not hold, as Gulf asserts (Pet. 15-17), that the terms of the 1963 warranty contract could be ignored in subsequently determining the meaning of the contracts' *force majeure* article. On the contrary, the Third Circuit looked expressly to the contract itself to find that the Commission erred in limiting Gulf's warranty to its obligation to "deliver by the expiration of the contract term the *total* amount of gas warranted", and thereby ignoring the contract's requirement that Gulf also "have a specific quantity of gas available *daily* from an unidentified source

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[5]Thus, the Commission's opinion stated (Pet. App. 40a) "At the outset, we must note that the issue here is not whether the *force majuere* provision of the warranty excused Gulf's performance. Rather, the issues is whether Gulf should be required to refund, subject to a recoupment mechanism, money attributable to gas Gulf would have delivered to Texas Eastern except for *force majuere.*" Moreover, the Commission's brief in the Third Circuit expressly denied the relevance of arguments that the Commission had wrongly construed the *force majuere* provisions of the contract, on grounds that the Commission had only "seemingly engaged in contract interpretation" but in reality had made a policy determination with respect to the enforcement of its prior order (FERC Brief in Third Circuit Case No. 82-3035, *et al.* at 41 n. 36).

of supply" (Pet. App. 20a, emphasis added). The court's conclusion that the *force majeure* provisions must be read in context of the entire contract is obviously correct, and its interpretation does not present any issue upon which this Court need rule.

II. The Decision Below Is Consistent With Precedent

Gulf's claim that the court of appeals misapplied this Court's opinion in *United States* v. *Brooks-Callaway Co.*, 318 U.S. 120 (1943) as holding that all *force majeure* claims must be limited to events which are unforeseeable is equally without merit. Gulf Pet. at 19-20. The Third Circuit's holding was, instead, that Gulf's warranty under Article I, Para. 4 (Pet. App. 21a) to have available on any day sufficient gas to enable it to deliver a stated quantity of gas can be read consistently with the *force majeure* clause, Article X (Pet. App. 11a n.8), providing that certain specified events will excuse performance where the event is not within the seller's control and cannot be overcome with the exercise of due diligence only by concluding that excused nonperformance cannot be justified simply by listing the occurrence of claimed *force majeure* events. Thus, the court indicated, downtime due to routine mechanical repairs, which accounted for over 70% of Gulf's claimed *force majeure*, could be held to be "not within the control of the party claiming suspension" only where Gulf showed that it had taken steps to secure additional gas sufficient to enable it to meet warranted daily deliveries in spite of these frequent and predictable repairs.

The Third Circuit's interpretation does not limit the types of events that are relevant under Gulf's *force majeure* clause;

it merely insisted upon a showing that the claimed events were outside the control and without the fault or negligence of Gulf, as required by the contract. In so holding the Third Circuit's reasoning follows this Court's decision in *United States* v. *Brooks-Callaway Co.*, 318 U.S. 120 (1943). Contrary to Gulf's argument (Gulf Petition at 19) that *Brooks-Callaway* can be applied only to events not foreseen by the parties, the *force majeure* event foreseen and specifically identified as at issue in the *Brooks-Callaway* contrct was "floods". 318 U.S. at 120 n. 1. The issue framed by the Court of Claims in *Brooks-Callaway* was virtually identical to Gulf's position here: the inclusion of an event in the *force majeure* provision automatically excuses non-performance. 318 U.S. at 122.

This Court rejected this contention — just as the Third Circuit rejected Gulf's contention — because such a reading "may easily produce unreasonable results." *Ibid.* This Court found that the inclusion of a type of event in the *force majeure* provision was not dispositive of whether all such events would excuse performance:

> A logical application of the decision below would even excuse delays from the causes listed although they were within the control, or caused by the fault of the contractor, and this despite the proviso's requirement that the events be "beyond the control and without the fault or negligence of the contractor." If fire is always an excuse, a contractor is free to use inflammable materials in a tinder-box factory and escape any damages for delays due to a resulting fire.

Id. at 723-24. The issue is not whether a type of event is listed

or unlisted (i.e., under Gulf's terms, foreseeable or unforeseeable), but whether other provisions in the same *force majeure* article limit the scope of the permissible excuse. Acceptance of any and all events listed as excusing nonperformance would make meaningless the contract requirement that the event be "beyond the control and without the fault of contractor." Accord, *Jennie-O Foods* v. *United States*, 580 F.2d 400 (Ct. Cl. 1978).[6]

III. The Court Used The Proper Standard In Interpreting The Contract

Gulf's argument that the court of appeals improperly construed its contract obligations under federal law rather than some unspecified state law standard is an unpersuasive after-thought not presented either to the Commission or the court of appeals in the proceedings below. Gulf Pet. at 20. Nor does Gulf in its present petition advance any assertedly controlling state law standard contrary to that followed by the court of appeals. It is, accordingly, unnecessary for this Court to consider the validity of Gulf's assumption that the

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[6]Petitioner attempts to limit *Brooks-Callaway* to cases where the exculpatory provision covers only "unforeseeable" events, and argues that the general rule, as expressed in *Eastern Air Lines Inc.* v. *McDonnell Douglass Corp.*, 532 F.2d 957, 992 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982), is that "[a]promisor can protect himself against foreseeable events by means of an express provision in the agreement." Gulf Pet. at 19. There is no inconsistency between the two cases. The question in *Brooks-Calloway*, as here, was not whether a seller could, with the concurrence of the buyer, limit its obligations upon the occurrence of specificed events, but whether and to what extent it had done so. The conclusion in both cases that it had not done so does not conflict with the *Eastern Air Lines* conclusion that a seller can expressly avoid risks associated with particular events. The instant case would be different if Gulf had taken a lesser assumption of risk under which it committed itself only to deliver gas immediately available from discrete wells.

Commission and court of appeals were required to apply state law in determining its obligations. Nor is there any conceivable basis for this Court granting review of the court of appeals opinion construing Gulf's delivery obligations under a unique warranty contract to provide guidance as to the proper law to be applied in the various contractual disputes between producers and pipelines now pending in state or federal courts.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis Lane, a member of the bar of this Court do hereby certify that three copies of the "Brief of the Public Service Commission of the Sate of New York in Opposition to Petitioner of Gulf Oil Corporation" have been served this 14th day of October 1983 on the following persons, by depositing the same in a United States post office or mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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